

operational independence or by attempting to do indirectly what the statute prohibits directly. Second, it requires the Commission to adopt whatever additional regulations are necessary, beyond those required by the other subsections of Section 272(b), to effectuate the statute's ban on integration and to assure that the affiliate and the BOC actually operate as if they are separate firms.

That is because the four specific requirements of Sections 272(b)(2-5) do not come close to establishing the operational independence of the BOC and its affiliate, and indeed, standing alone would permit a nearly full range of joint planning and engineering that would be the antithesis of the independence and separation required by the Act. Section 272(b)(1) should thus be construed to require at least the additional structural separation rules of Computer II, which were likewise designed to mitigate the potential for discrimination and cost misallocation inherent in the integration of monopoly and competitive services.²⁰ Those rules, among other things, prohibited the affiliate from constructing, owning, or operating its own transmission facilities, and limited the affiliate's provision of basic service to the resale of the end-to-end services of AT&T or a BOC.²¹ The BOC affiliate should likewise be prohibited under Section 272(b)(1) from constructing its own exchange facilities, from purchasing unbundled network elements from the BOC under Section 251(c)(3) and

²⁰ See Computer II Final Order, 77 F.C.C.2d 384, 417 (1980) ("Computer II").

²¹ See Computer II, 77 F.C.C.2d at 474 (¶ 229); Report and Order, AT&T Co: Provision of Basic Services Via Resale by Separate Subsidiary, 98 F.C.C.2d 478 (1984).

combining them to offer exchange services, or from offering exchange service other than through service resale under Section 251(c)(4).

In the absence of such a rule, the BOC and its affiliate would be able to achieve precisely the integration of exchange and interexchange facilities that would contravene the core purposes of the Act. The overriding reality is that the BOC and its affiliate cannot possibly "operate independently" if they are both in the same business of providing exchange service. There would then be no practical way to prevent the BOC or its parent from engaging in the coordination and joint planning that Section 272 prohibits by choosing to perform new exchange functions in the "separate" affiliate or otherwise evading § 272's requirements.

For example, the BOC would have every incentive, when it contemplates the development of new equipment that would enhance its exchange service, to implement such advances not within its own network (where the results would then become available to competitors under Sections 251(c)(2-4), 272(a), and 272(c)), but within that of its affiliate (which the BOC would then claim would not be an "incumbent local exchange carrier" subject to those provisions). The affiliate's exchange service would then become the vehicle for a massive loophole in Sections 251 and 272, as the innovations that should, and would otherwise, be part of the BOC's network and made available to all carriers are instead placed in that of its unregulated affiliate. The result would be inefficient and unwarranted distortion of the market as the BOC's affiliate gained quality and cost advantages over competitors who remained

dependent on the unimproved and atrophied network of the BOC itself.

The joint marketing provisions of Section 272(g) likewise make clear that the provision of exchange services by the affiliate (other than through resale) would be inconsistent with the statute. There would have been no need for Congress to have specified the limited terms under which the affiliate could "market or sell" the BOC's exchange services (see Section 272(g)(1)) if the BOC could instead have the affiliate build its own exchange facilities, or offer services through a combination of its own facilities and unbundled network elements purchased from the BOC.

As the NPRM notes (§ 58), in addition to the prohibition on the construction, ownership, or operation of exchange facilities, the Computer II rules (1) required the affiliate to obtain transmission capacity from the carrier only pursuant to tariff; (2) required the affiliate to use separate computer facilities to provide unregulated services; (3) prohibited the joint use of physical space or property on which is located transmission equipment or facilities used to provide basic transmission services; (4) prohibited the development of software by the regulated carrier for the affiliate, and vice versa; and (5) required disclosure, to competitors of the affiliate, of information that the BOC possesses as a result of its control of essential facilities (such as standards and designs), and information primarily used in marketing, to the extent that such information was disclosed to the affiliate, on the same terms and conditions under which the information was disclosed to the

affiliate.²² While some of these rules are independently mandated by other provisions of Section 272,²³ the Commission should make clear that all of them are necessary elements of the operational independence requirement of Section 271(b)(1). The Commission should also make clear that any joint planning or joint service development by the BOC and its affiliate would likewise be prohibited by Section 271(b)(1).

Finally, the Commission seeks comment (§ 59) on whether in the alternative it should impose only the far more limited conditions that were imposed on independent LECs in Competitive Carrier as a precondition for their non-dominant status in the interexchange market.²⁴ It should not. Satisfaction of those three minimal rules would not remotely establish the operational independence required by Section 272(b)(1), as is confirmed by the fact that two of the three are separately required by other provisions of Section 272.²⁵ Indeed, because both the specific structural separation requirements of Sections 272(b)(2-5) and the specific non-discrimination requirements of Section 272(e) go far

²² See Computer II, 77 F.C.C.2d at 474, 477-481.

²³ See, e.g., Section 272(c)(1) (prohibiting discrimination in the provision of information).

²⁴ Competitive Carrier required merely that the LEC and its affiliate (1) maintain separate books of account; (2) not jointly own transmission or switching facilities with the local exchange company; and (3) obtain any of the exchange company's services at tariffed rates and conditions. See Fifth Report and Order, Competitive Carrier Proceeding, 98 F.C.C.2d 1191, 1198 (§ 9) (1984).

²⁵ See Section 272(b)(2) (separate books, record, and accounts); Section 272(e)(2) (affiliate may obtain services from BOC only on same terms as are available to unaffiliated entities).

beyond what Competitive Carrier required, and because the "operate independently" requirement extends those specific requirements even further, the terms and purposes of the Act preclude any claim that the Competitive Carrier rules could satisfy § 272's requirements.

2. The "Separate Officers, Directors, and Employees" Requirement of Section 272(b)(3)

Section 272(b)(3) provides without qualification that the BOC affiliate "shall have separate officers, directors, and employees from the [BOC] of which it is an affiliate." 47 U.S.C. § 272(b)(3). The legislative history of this provision makes clear that it was intended to achieve "fully separate operations" between the BOC and the affiliate,²⁶ and effectuating that purpose requires rules that prohibit personnel of the BOC from being involved in any way in the operation, planning, marketing, or other activities of the affiliate, and vice versa, and that require that each entity conduct its operations, planning, marketing, and other activities totally separate from the other.

The sharing of personnel between the BOC and the affiliate for service development, planning, marketing, and operations would create the very integration that is prohibited by the statute. The sharing of in-house services, including the sharing of administrative services permitted in Computer II (see NPRM, ¶ 62), is likewise inconsistent with the concept of separate personnel. Such sharing would increase the amount of joint and

²⁶ See H. Rep. No. 204, supra, at 79 (stating that separate affiliate requirements of House bill, which contained the "separate officers, directors, and employees" requirement, "mandates separate operations and property").

common costs, and the necessity for allocating these costs, that the requirement of separate personnel was enacted to reduce. Similarly, Section 272(b)(3) also prohibits the sharing of services, such as insurance or pension services, provided by outside vendors to both the BOC and the affiliate. Id., ¶ 62. Sharing of out-sourced services would create the same opportunity for misallocation of costs that the sharing of in-house services would provide.

The Commission further seeks comment (¶ 62) on whether other types of personnel sharing are prohibited by Section (b)(3). The Commission should make explicit that two in particular are prohibited.

First, a BOC is not permitted to establish a second affiliate to perform services for the BOC and the interexchange affiliate. Under such an arrangement, the personnel in the third entity are de facto shared employees of the BOC and the interexchange affiliate, and the BOC and its affiliate would thus be in violation of Section 272(d)(3). Such a practice would likewise violate Section 272(b)(1), because an affiliate does not "operate independently" of the BOC when a third entity created by the BOC is providing the same services to both the BOC and the affiliate. Indeed, if such an end-run were permissible, the statutory requirements could all be easily evaded. The BOC and the interexchange affiliate would simply outsource all their activities to a second affiliate -- in which case the BOC could achieve the precise joint integration prohibited by Section 272.

Second, the Commission should prohibit the BOCs from using any compensation system that directly or indirectly bases any part of the compensation of BOC officers, directors, or employees on the performance of the affiliate, or vice versa. Personnel paid under such a system would effectively be shared employees, because they would have financial incentives to work to promote the interests of both the BOC and its affiliate at the expense of their competitors.

3. The Credit Restrictions of Section 272(b)(4)

The non-recourse provisions of Section 272(b)(4) prohibit an affiliate from obtaining credit under any arrangement that would permit the affiliate's creditors, upon default, to have recourse to the assets of the BOC. The obvious purpose of this requirement is to prevent cross-subsidization -- or, as the NPRM states (§ 63), "to protect subscribers to a BOC's exchange and exchange access services from bearing the cost of default by BOC affiliates."

Because the statute prohibits "any arrangement" allowing the creditors of the affiliate to have recourse to the assets of the BOC, the statute is not restricted to a particular type of document or a particular type of transaction. Thus, the NPRM correctly proposes (*id.*) to forbid a BOC from co-signing a contract, or any other instrument, that would allow the affiliate to obtain credit in a manner that violates Section 272(b)(4). To promote compliance with the statutory requirement, the Commission should also require that any contract or other document in which an affiliate obtains credit contain a provision expressly stating that

the creditor, upon any default by the affiliate, has no recourse to the assets of the BOC.²⁷

4. The "Arms-Length" Requirement of Section 272(b)(5)

In its Accounting Safeguards NPRM, the Commission invited comments on interpreting and implementing the "arms length" requirements of Section 272(b)(5).²⁸ While AT&T will address these issues in detail in its comments in that proceeding, a few points warrant mention here.

Section 272(b)(5) requires affiliates to "conduct all transactions with the [BOC] of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection." The requirements of written documentation and public disclosure of all transactions are intended to prevent the BOCs from engaging in discrimination and cross-subsidization for the benefit of their affiliates, by subjecting the transactions to public scrutiny.

The term "transactions" should therefore be interpreted broadly, to include requests by an affiliate to the BOC for telephone exchange service or exchange access. See Accounting

²⁷ The Commission should also exercise its complementary authority under Section 272(b)(1) to prohibit a BOC affiliate from obtaining credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of any parent of the BOC. Allowing an interexchange affiliate to obtain credit under an arrangement that gave the creditor recourse to the assets of a parent shared by the affiliate and the BOC would be a form of cross-subsidy, because it would reduce the economic value of recourse to the parent's assets by the BOC's creditors, and thus would increase the BOC's cost of capital. An affiliate is not "operating independently" of a BOC if the BOC (and, ultimately, its ratepayers) bear some of the capital costs of the affiliate.

²⁸ See Accounting Safeguards NPRM, ¶¶ 70-88.

NPRM, ¶ 75. Under Section 272(e)(1), a BOC must fulfill any request by an unaffiliated entity for such service or access within a period no longer than that within which it provides the service or access to its affiliates. See 47 U.S.C. § 272(e)(1). Public disclosure of affiliate requests would foster the ability of competitors and the Commission to monitor the degree of a BOC's compliance with this provision (and, correspondingly, any instances of discrimination in violation of this provision).

Furthermore, as in Computer II, the term "transaction" should be defined to include any transaction which involves the transfer (either directly or by accounting or other record entries) of money, personnel, resources or other assets between the BOC and the affiliate. See Computer II, 77 F.C.C.2d at 482-483, ¶ 252. An interpretation that restricted "transaction" to transfers of money would effectively exclude one of the methods of cross-subsidization with which Section 272(b)(5) is obviously concerned -- the provision of products, services or personnel by a BOC to its affiliate at no cost or as part of an in-kind exchange.

Finally, the requirement of Section 272(b)(5) that the "transaction" be "reduced to writing" obligates the BOC to memorialize all aspects of the transaction that affect its economic value -- including prices, terms, and conditions -- in a written document. To implement the additional statutory requirement that the written document be made available for public inspection, the Commission should require that the BOCs file tariffs setting forth the rates, terms, and conditions governing their provision of services to the affiliate, and written contracts setting forth the

same information for transactions involving goods and any other non-tariffed transfers between the BOC and the affiliate.

B. Non-Discrimination

Section 272 contains two sets of nondiscrimination provisions. Section 272(c) broadly provides that a BOC "may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards." Because Section 272(f) allows the Commission to permit this prohibition to "sunset" and become inapplicable to a BOC three years after it or its affiliates obtain interLATA authority (see § 272(f)), the general nondiscrimination provision of § 272(c) will not necessarily apply to a BOC after the initial three year period.

Section 272(e), by contrast, contains a series of very specific prophylactic prohibitions that are not subject to sunset. They are designed to assure (1) that each unaffiliated entity's exchange or exchange service requests are always provisioned as rapidly as a BOC's or its affiliate's (§ 272(e)(1)); (2) that there is no discrimination favoring a BOC affiliate in any facilities, services, or information concerning exchange access (§ 272(e)(2)); (3) that each BOC or affiliate incurs exchange or exchange access charges that are no less than any unaffiliated carrier pays (§ 273(e)(3)), and (4) that any interLATA or intraLATA facilities that can be provided to a BOC affiliate are available to nonaffiliates at the same rates and terms (§ 272(e)(4)).

The NPRM has asked for comment on several questions that relate to the breadth and scope of these prohibitions and how they should be implemented in Commission regulations.

1. Section 272(c)

AT&T generally agrees with NPRM's tentative conclusion (§ 66) that the broad and general prohibition of § 272(c) can be regarded as "subsum[ing]" the more specific provisions of § 272(e) until such time, if any, as the Commission exercises its authority to allow § 272(c) prohibitions to expire.²⁹ In any event, because the requirements of Section 272(e) will apply for at least as long as the requirements of Section 272(c), whether they are subsumed or separate is immaterial.³⁰

The NPRM also notes (§ 67) that Congress adopted Section 272's prohibition against discrimination against any entity with

²⁹ The NPRM notes that the provisions of Section 272(e)(2) and § 272(e)(4) apply by their terms only to the relationship between a BOC and the separate affiliate established under § 272(a), and the NPRM asks if these provisions will cease to apply if and when the separate affiliate requirement of § 272(a) & (b) are sunset. The answer is that it should not. Section 272(f) provides that the nondiscrimination provisions of Section 272(e) cannot be sunset, so to the extent any of these provisions presupposes the existence of a separate affiliate, the BOC is required to continue to provide interexchange service through such an affiliate (although the affiliate would no longer be required to comply with the specific separation requirements of § 272(b) after its provisions have been allowed to sunset for that BOC).

³⁰ Some have suggested, however, that because § 272(e) applies to a BOC and to any affiliate that is subject to § 251(c), but Section 272(c) applies only to a "BOC," a BOC could avoid § 272(c) by transferring assets to another affiliate. It could not. As the NPRM notes (§ 79), § 153(4) of the 1996 Act provides that a "Bell operating company" includes "any successor or assign [of a BOC]...that provides wire line telephone exchange service." The Commission should affirm this tentative conclusion in its regulations.

respect to the broadest possible "types of categories of services": i.e., "in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards." The NPRM asks (§ 67) what this requirement means, or should be construed to mean, in the case of competitors that use equipment with different technical specifications from a BOC's affiliate's equipment. In particular, it asks whether the BOC is obligated not merely to treat all other entities in the same manner as it treats affiliates, but also to provide the "same quality of service or functional outcome identical to that provided to the affiliate even if this would require the BOC to provide goods, facilities, services, or information to the requesting entity that are different than those provided to the BOC affiliate." NPRM § 67.

The answer is it absolutely does and should -- unless the nonaffiliated carrier has expressly requested less advantageous treatment in exchange for paying a lower price. The reality is that if a BOC were required to meet only the technical and other requirements of its affiliate and could fail to offer the same quality of service to nonaffiliated carriers merely because they use different equipment, then the BOC would have carte blanche to gain insuperable advantages by designing interfaces that work optimally only with its affiliates' specifications -- and no others -- stifling innovation and other forms of competition. At a minimum, any failure by a BOC to achieve identical outcomes should be treated as prima facie evidence of discrimination.

Conversely, the Commission's rules must make it explicit that a BOC cannot satisfy its obligations under § 272(c) merely by providing "identical" outcomes between its affiliate and its affiliate's rivals. A critical element of interexchange competition and of the innovation that benefits consumers is that interexchange carriers are constantly requesting new access arrangements that will allow new or more cost effective interexchange services. While it may be difficult or virtually impossible as a practical matter to enforce a requirement that BOCs respond to an unaffiliated entity's request in the same way it would an affiliate, the Commission should not permit a BOC to deny its rival's request (or delay implementation until the BOC affiliate is ready with a competing service) on the ground that everyone is receiving the same access service at the same price.

The NPRM also notes that Section 272(c) is unlike the provisions of §§ 201 and 202 of the Communications Act of 1934 -- which also remain in effect and which prohibit common carriers from engaging in "unjust and unreasonable" practices or from making "any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services" for or in connection with "like" services. 47 U.S.C. §§ 201(b), 202(a). On this basis, the NPRM asks (§ 75) whether and when a BOC can justify differences in treatment under § 272.

The plain terms of Section 272(c)(1) require the NPRM's tentative conclusions (§ 73) that the prohibition against discrimination means "at minimum, that BOCs must treat all other entities in the same manner as they treat their affiliates, and

must provide and procure goods, services, facilities and information to and from these other entities under the same terms, conditions and rates." It should make it explicit that any differences in treatment between BOCs or their affiliates and their competitors are unlawful unless they are products of deliberate choices on the part of the competitors to receive different or less favorable treatment in exchange for a lower price.

The NPRM (§ 39) notes that its existing Computer III nonaccounting safeguards are designed to protect against discrimination in pricing and provisioning facilities and in information about them, and solicits comments as to whether these provisions are sufficient to implement § 272(c)(1). They are not. While these provisions may provide some useful starting points and analogies, the Computer III safeguards focus on only a subset of the facilities and services that the 1996 Act makes eligible for unbundled access, and therefore potentially subject to discrimination by the BOCs.

More fundamentally, even if the Computer III regulations are broadened to apply to all exchange and exchange access services, they would not be adequate to implement § 272(c) without the other rules discussed herein. The Computer III rules were fashioned to give rights to firms competing with a BOC who provides competitive and monopoly services on an unseparated basis, and do not, therefore, consider how to require equal treatment between a BOC affiliate and its competitors. In addition, as noted below, they include the reporting requirements that permit averaging of reporting data across and within categories in ways that can be

used to mask and authorize significant discrimination. Implementation of Section 272(c) and 272(e) requires reporting requirements that would enable the Commission to assure that unaffiliated entities have their requests filled in a period "no longer" than any comparable request of the BOC affiliate -- as explained in detail below.

The NPRM also asks about the relationship of § 272(e) to the separate Customer Proprietary Network Information ("CPNI") provisions of Section 222 of the Act, as amended by the 1996 Act. At a minimum, Section 272's non-discrimination requirements do not permit a BOC to use, disclose, or permit access to CPNI of BOC customers for the benefit of its separate affiliate, directly or indirectly, unless the CPNI is made available to all competing carriers. In this regard, a BOC could neither provide the CPNI to its affiliate nor use the CPNI in marketing the affiliate's interLATA service "jointly" with the BOC's exchange service without making the same CPNI available to other interexchange carriers.³¹

With respect to standard-setting, the Commission's concerns that the BOCs could harm competition by creating standards that favor the BOCs' affiliates or disadvantage their rivals are

³¹ In particular, if the BOC uses that information to market the services of its affiliates, a BOC could not avoid liability by claiming it would simply itself market other interexchange carrier's services under the same terms. The CPNI information -- and not just a theoretical right to use a purportedly neutral BOC marketing service -- must be made available to all competing providers to avoid discrimination.

well-founded.³² Previous efforts to ensure impartiality by the BOCs in standards-setting organizations have been less than fully successful.³³ However, the most the Commission can realistically do to implement this aspect of Section 272(c) is to involve itself in the standard setting processes in appropriate cases and, in all events, to treat the adoption of a standard that favors a BOC affiliate and that harms its rivals as establishing a prima facie case of a violation of § 272(c) -- and provide expedited review of any complaints.

Finally, the Commission should provide that it is a per se violation of Section 272(c) for the BOC to share with its affiliate the information which interexchange carriers must provide to it in order to obtain access services. Any such discriminatory transfer of information would constitute a patent abuse of the BOC's market power, and should be strictly prohibited.³⁴

C. Section 272(e)

As noted above, there are four separate prohibitions of § 272(e) that must be defined in this proceeding.

³² AT&T Opposition to the Four RBOCs' Motion to Vacate the Decree, pp. 52-67 & Aff. of Stephen G. Huels, ¶¶ 50-53 (App. A, Vol. II, Tab 5), United States v. Western Elec. Co., No. 82-0192 (D.D.C. filed Dec. 7, 1994).

³³ Id. (¶ 52).

³⁴ A similar restriction has been adopted by the Federal Energy Regulatory Commission (FERC) with respect to interstate natural gas pipeline companies that have marketing affiliates. See 18 C.F.R. § 161.3(e).

1. Section 272(e)(1)

Section 272(e)(1) provides that BOCs and their incumbent LEC affiliates "shall fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or to its affiliates." 47 U.S.C. § 272(e)(1) (emphasis added). By its terms, this subsection prohibits any conduct in fulfilling service requests that favor a BOC or BOC affiliate regardless of the line of business in which either participates. See NPRM, ¶¶ 81-82. Enactment of this rule reflects the reality that the timely fulfillment of requests for exchange service and access -- including the development of new services -- is a critical requirement in the creation of a competitive environment.

Section 272(e)(1) is notable in that it does not mandate only comparability in average response times. The use of average response times would allow BOCs to obtain improper advantages by providing access for its services rapidly when the customers' needs are highly time-sensitive users and services to gain a competitive advantage, while maintaining relatively longer average response times by providing slower service to itself in areas where response times are less significant -- and doing the opposite when requests are made by competitors. Section 272(e) precludes such tactics by mandating that any unaffiliated carrier's request be filled in a period "no longer" than such a request by an affiliate. The BOC's response time to any affiliate's requests for an exchange or exchange access service is thus a mandatory maximum period for

responses to any unaffiliated entity's request for any such service. The Commission's regulations should give effect to this requirement.

The Commission has proposed that the term "requests" as used in § 272(e)(1) be construed to include initial installation requests, and all subsequent requests for improvements, upgrades and modifications, and repair and maintenance. NPRM ¶ 83. This interpretation is compelled by Section 272(e)(1)'s terms and Congress's clear intent to require the BOCs to provide exchange service and access that is at least competitively equal to that provided to the BOCs' own affiliates, and should be adopted.

For the reasons stated above, the service interval reporting requirements established in the Computer III proceedings would not be sufficient to implement this provision. NPRM ¶ 85. By contrast, to implement § 272(e)(1), the Commission should require the BOCs to disclose their response time for each request for service from their affiliates. Response times should be categorized by each type of service requested, including separate categories for new service, upgrades, maintenance, and so on. Underlying data for each such request or individual transaction should also be provided; average or aggregated data should not be deemed to comply with this disclosure requirement. The BOC should be required publicly to disclose and maintain schedules showing the shortest interval for the response to its own or its affiliates' request for service with respect to each service category, in that these would be the maximum response time for requests by

nonaffiliates, which must be fulfilled in periods that are "no longer."

The Commission must also require BOCs to offer affiliated and unaffiliated entities the same (or equally effective) procedures for requesting service, and that improvements and upgrades in those procedures routinely be made available to non-affiliates. A BOC that enabled its affiliate to place service orders by electronic mail or through a direct computer interface, while requiring unaffiliated entities to order by conventional voice, fax, or other slower and less reliable means, could achieve a significant competitive advantage while reporting similar response times. In this regard, the BOC must be required to extend the same degrees of effort in understanding requests and correcting errors in the case of requests made by nonaffiliates as it does in responding to requests by personnel of the BOC or the BOC's customers or affiliates.

2. Section 272(e)(2)

Section 272(e)(2) provides that BOCs and their LEC affiliates "shall not provide any facilities, services, or information concerning its provision of exchange access to [an interLATA affiliate] unless such facilities, services, or information are made available to other providers of interLATA services in that market on the same terms and conditions." The Commission has requested comment on the appropriate implementation of this requirement. NPRM ¶ 86.

The BOCs should be required to make timely, complete, and public disclosure of all exchange and exchange access services and

facilities used by its interLATA affiliate and the terms, conditions, and procedures under which they were provided to that affiliates, and to update this information whenever modifications or upgrades to these procedures are implemented or become available. The BOC should further be required publicly to disclose to all other carriers any information concerning exchange access that is provided to its affiliate simultaneously with its provision to the affiliate -- including responses to a BOC affiliate's request for information about new access arrangements or any other information relating to such access services or arrangements. In addition, the Commission should prohibit a BOC from providing its affiliate any information relating to technical changes to the network affecting or concerning exchange access unless the information is provided in technical references or other written materials that are simultaneously provided to other carriers.

3. Section 272(e)(3)

Section 272(e)(3) requires that BOCs and their LEC affiliates charge their interLATA affiliates, or impute to themselves, an amount for access to telephone exchange service and exchange access "that is no less than the amount charged to any unaffiliated interexchange carrier for such service" (emphasis added). The Commission has tentatively concluded that this requirement can be effectively implemented by requiring BOCs to provide such access under tariffed rates, and to charge their affiliates or impute to themselves the tariffed rate. NPRM ¶ 88. While this proposal may be a necessary condition to the effective implementation of this provision, it would not be sufficient to

assure that the BOC or BOC affiliate formally incurs a charge that is "no less than" the amount charged "any" unaffiliated interexchange carrier.

In particular, experience has shown that the BOCs are capable of designing and implementing tariff provisions that may appear facially neutral, but that in effect provide benefits only to their affiliates, such as discounts for increases in usage levels that only their affiliates (as new entrants) can satisfy. To give effect to the requirement that a BOC or its affiliate incur a charge that is "no less" than any other interexchange carrier, the BOC must be required to impute to itself or to charge an affiliate a price per unit of traffic that reflects the highest unit price that any interexchange carrier pays for a like exchange or exchange access service: i.e., for a service that is functionally equivalent from the perspective of the interexchange carrier to the service used by the BOC.³⁵ At a minimum, the Commission should adopt a rule that any tariff provisions that has the effect of giving a BOC or BOC affiliate a lower charge per unit of traffic than other interexchange carriers pay for like services is presumptively invalid. In all events, a BOC or its affiliate should not be permitted to take advantage of any rate for which unaffiliated carriers do not or reasonably could not qualify.

³⁵ See Competitive Telecommunications Ass'n v. FCC, 998 F.2d 1058 (D.C. Cir. 1993); MCI Telecommunications Corp. v. FCC, 917 F.2d 30, 39 (D.C. Cir. 1990); Ad Hoc Telecommunications Users Committee v. FCC, 680 F.2d 790, 795 (D.C. Cir. 1982).

4. Section 272(e)(4)

Section 272(e)(4) provides that BOCs and their LEC affiliates "may provide any interLATA or intraLATA facilities or services to its interLATA affiliate if such facilities or services are made available to all carriers at the same rates and on the same terms and conditions, and so long as the costs are appropriately allocated." This provision is straightforward insofar as a BOC affiliate is obtaining interLATA or intraLATA services that a BOC is authorized itself to provide to its retail customers. Other carriers must be allowed to obtain the same service at the same rates and under the same terms and conditions as apply to the BOC affiliate.

However, several BOCs have made statements that suggest that they intend to claim that Section 272(e)(4) authorizes them to plan, engineer, and construct in-region interexchange facilities on an integrated basis with their local exchange business and use newly-constructed or previously-constructed interexchange transmission or switching facilities and services to supply their affiliates and any (resale) carriers who want to purchase the BOC's wholesale interexchange facilities and services. This position is not only contrary to the terms and structure of the Act, but also would nullify the other provisions of § 272 and the Act's purposes.

First, the terms and structure of the Act make it explicit that Section 272(e)(4) applies only to those interexchange facilities and services that the BOC may independently itself provide without violating Section 272(a) and prohibits a BOC from providing any other interexchange services or facilities. In

particular, Section 272(a) defines the services that a BOC may itself provide and categorically prohibits a BOC from itself originating any interLATA services other than the incidental services authorized in Section 271(a)(1), (2), (3), or (5), out-of-region services, or services previously authorized by MFJ waivers. By the terms of Section 272, this prohibition on the BOC's direct provision of other interLATA services -- and the requirement that other services be provided by a fully separate affiliate -- will continue to apply to a BOC until such time as the requirement of Section 272(a) is "sunset" and "cease[s] to apply" to the BOC pursuant to the provisions of Section 272(f).

Section 272(e)(4) does not create an exception to the categorical prohibition of Section 272(a). Rather, it provides the conditions under which the authorized services can be provided to an interLATA affiliate. For example, Section 272(a) permits a BOC to provide the interLATA service of transporting network control signalling used to set up interLATA calls across LATA boundaries and to hand it off to an interexchange carrier at one or more centralized points in a Regional Bell Company's region. See Section 271(g)(5); cf. United States v. Western Elec., 969 F.2d 1231, 1234-37 (D.C. Cir. 1992). Section 272(e)(4) allows a BOC to provide this interLATA network control signalling service to a long distance affiliate only if the BOC makes the service available to nonaffiliated carriers at the same rates and on the same terms and conditions and so long as the costs are appropriately allocated.

Further, it would nullify the statutory scheme and give the BOC carte blanche to cross-subsidize long distance service and

engage in discrimination against facilities-based long distance carriers if a BOC could supply other general long distance facilities or services to its long distance affiliate before such time as the provisions of Section 272(a) are sunset. In that event, a BOC's separate affiliate could use interexchange facilities that were planned, designed, developed, engineered, and constructed on an integrated basis with the BOC's monopoly exchange services. Indeed, because Section 272(g)(2) permits a BOC to market a long distance affiliate's service, the BOC would be designing, developing, and engineering the very interexchange services and facilities that BOC personnel would market both to resale and wholesale customers.

This joint development of exchange and interexchange services by a BOC would nullify the separation requirements of Sections 272(a) & (b), and would permit the very discrimination and cost misallocations that these provisions were designed to prevent or inhibit. Further, the joint activity would inherently create that discrimination in favor of the BOC and its affiliates and against "any other entity" that § 272(c) and § 272(e) are designed to prevent. The reality is that a BOC that constructed interexchange facilities for its affiliate would inherently discriminate in favor of itself and its affiliates and against other interexchange carriers in providing goods, services, facilities, and information to others, for no other interexchange carrier would be able to plan, construct, engineer, and integrate its long distance network with the BOC's exchange network in these ways.

Nor would this inconsistency with the terms and purposes of Section 272(a), (b), (c), and (e) be altered by the fact that the BOC would be required to make available the interLATA facilities or services to "all" nonaffiliated "carriers" "at the same rates and on the same conditions" as the BOC affiliate. Quite apart from the possibility that the BOC rate schedules would favor its affiliate, the entities who would then have any interest in obtaining interexchange facilities or services from a BOC would be resellers, not AT&T, MCI, Sprint, LDDS, and the many other carriers who have constructed their own facilities. Indeed, if BOCs could construct interLATA facilities and services and provide them to resellers, they would do so in direct competition with the national facilities-based long distance carriers -- and the BOC would have used its local exchange position unfairly to advantage both its own "wholesale" long distance service and the retail long distance services of an affiliate. The separation and nondiscrimination requirements of Section 272 are designed to protect "any entity" both from the discrimination that would inherently result from a BOC's construction of interLATA facilities for use by its affiliate and resellers and also from the severely enhanced risks of cost misallocations and cross subsidization that would equally result. That some resale carriers might benefit is thus irrelevant and merely underscores why the only services that a BOC under § 272(e)(4) can provide its affiliate are those that the BOC is independently authorized to provide under Section 272(a).

Finally, it is noteworthy that Sections 272(a) and (e) prohibit a BOC from providing any interexchange services or